83-1135

SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1983

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent,
v.
SERGE M. d'ELIA,
Petitioner.

PETITION FOR WRIT OF CERTIORARI
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
(APPELLATE DEPARTMENT)

SERGE M. d'ELIA
c/o 4075 Agate Street
Riverside, California 92509
In Pro Persona

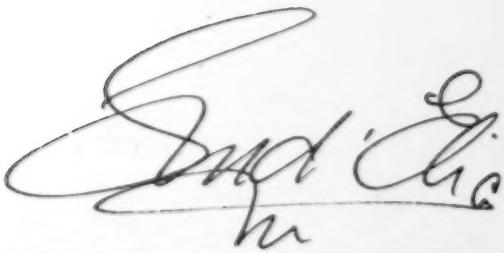
J. GALLAGHER - Printed Briefs (714) 686-3837

QUESTIONS PRESENTED

Is it denial of "due process and equal protection" under the Sixth and Fourteenth Amendments to the United States Constitution, to sustain a criminal conviction on hearsay evidence, thus denying the Defendant his guaranteed right to confront and cross-examine all witnesses against him?

CERTIFICATION AS TO INTERESTED PARTIES

Counsel for the Petitioner hereby certifies that there are no other parties of interest in the case at bar except those listed in the caption and their attorneys of record. These representations are made to enable judges of the court to evaluate possible disqualifications or recusal.



Serge M. d'Elia

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PETITION FOR WRIT OF CERTIORARI

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Serge M. d'Elia, the petitioner herein, prays a Writ of Certiorari issue to review the Judgment of the Superior Court of California, County of Riverside, Appellate Department entered in the above case on November 8, 1983.

OPINIONS BELOW

The opinion of the Superior Court of California, County of Riverside, Appellate Department, is printed in Appendix "A" hereto, infra.

JURISDICTION

The judgment of the Superior Court of California, County of Riverside, Appellate Department, was entered on November 8, 1983. The jurisdiction of the Supreme Court is invoked under Title 28, U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendments VI and XIV
California Vehicle Code §22348
California Evidence Code §1200
California Penal Code §686

STATEMENT OF THE CASE

Serge M. d'Elia, Petitioner herein, was cited by California Highway Patrol Officer Pedro Barrera, for a violation of Section 22348(a), California Vehicle Code. The officer cited Petitioner on **January 5, 1982, at 5:00 p.m.** and Petitioner signed the promise to appear on **January 28, 1983.** (emphasis added.)

On January 21, 1983, Petitioner was arraigned, pleaded Not Guilty and requested a court trial. Petitioner signed a promise to appear for trial on May 20, 1983 at 1:00 p.m. At this time Petitioner also signed a Waiver of Time for Trial. Petitioner also posted $75.00 Bail at this time.

On May 20, 1983, Trial was held before the Honorable Charles F. Pendleton, who found the Petitioner Guilty. The People were represented by Deputy District Attorney Cregor Datig.

A timely Notice of Appeal was filed by the Petitioner on June 16, 1983. On July 7, 1983 the Court extended the time for filing the Proposed Settled Statement on Appeal to July 20, 1983.

ISSUES ON APPEAL

1. FACTUALLY CORRECT INFORMATION ON CITATION, INCORRECT.
2. VENUE WAS NOT ESTABLISHED IN THE TRIAL COURT FOR JURISDICTION.
3. CALIBRATION OF THE SPEEDOMETER OF THE CHP UNIT WAS NEVER PROVED.
4. HEARSAY EVIDENCE WAS ADMITTED AND USED AS A BASIS FOR CONVICTION.
5. TIME, SPEED AND DISTANCE TESTIMONY OF OFFICER IN ERROR.
6. OFFICER'S DEPTH PERCEPTION AND DISTANCE IS IMPOSSIBLE.
7. NO DIRECTION OF TRAVEL AND NO HIGHWAY IDENTIFICATION WAS PROVED.

"FACTUALLY CORRECT" CITATION WAS IN FACT INCORRECT

On the face of the citation, we read the following facts. Date of offense: **1-5-82**. Time of the offense: **5 p.m.** Detitioner was arraigned on the charges on January 21, 1983 and he pleaded Not Guilty. Trial ws set for May 20, 1983. At the arraignment, the court noted **no errors** at that time and the official court documents bear the same date and time as above. The Petitioner came to trial on May 20, 1983 prepared to defend himself on the charges made as of that time and date. The District Attorney either did not notice the time and date or he chose to ignore them. The District Attorney asked Officer Barrera the following question:

"**Q.** The date on which this infraction occurred was January 5, 1983, was it not?

A. Yes.

Q. At what time in the morning did this occur?

A. At 5 a. m."

In the Settled Statements of Facts on Appeal, the court noted "Court corrected citation date by inter-lineation to show 1/5/83 at 5:00 a.m. rather than 1/5/82, 5:00 p.m. their (sic) being no dispute that the correct date of the traffic stop and citation was 5/1/83. . ."

The District Attorney chose to handle this factually correct information on the face of this citation in this manner. The court appears to take part as the prosecutor and in the Settled Statements of Facts on Appeal corrects the

errors. However, the court in trying to build a case for the People neglected to read the court record kept by the court clerk Renee Stickel. Under "PROCEEDINGS" on May 20, 1983 the clerk noted, "Def.req. that case be dismissed under 1118 PC as citation was dated 1-5-82 & Trial was not heard until 5-20-83. Court denies motion" The court stated that "their (sic) being no dispute" has overlooked the court record. Certainly the motion under 1118 PC made by the defendant would seem to indicate that in fact there was some type of dispute about the date and time of the citation. The court also seemed to miss some of these facts when he first was engrossing the Settled Statement of Facts. The court came back to his corrections and inserted further corrections as to the time from 5 p. m. to 5 a. m. was placed over the line by placing a caret on the line. Again the court was trying to preserve the record for the People that the District Attorney had chosen to ignore.

Before the Petitioner rested, he again brought to the court's attention the fact of errors on the citation. The Court merely brushed these facts aside with the comment "anyone can make an error". (See Exhibit "A".)

7/20/83 Statement engrossed as follows:

Court corrected citation date by interlineation to show 1/5/83, 5:00 AM rather than 1/5/82, 5:00 PM there being no dispute that the correct date of the traffic stop and citation was 1/5/83.

The officer had independent recollection of that fact.

~~The officer had independent recollection of Covina~~ ~~The traffic stop was affected in Covina~~ ~~Charles D. Pendleton~~ and defendant identified as the driver by the officer as engrossed; the defendant's proposed Statement of Facts will be the Settled Statement of Facts on the appeal.

Charles D. Pendleton
Judge

7/20/83

EXHIBIT A

VENUE NOT ESTABLISHED

It would appear from the Settled Statements on Appeal, that the court was trying to build a foundation under a very weak and shaky case. The court, it would appear, was taking the position of the prosecutor, and trying by inter-lineation to correct some of the errors made by the District Attorney.

Nowhere does the PLACE where the violation occurred appear in the Settled Statement. This question was NEVER ASKED of the officer on direct or cross-examination. The court in engrossing the proposed Settled Statements of Facts even missed this Venue. Venue was not established at the trial. The court even signed the Settled Statements of Facts on Appeal, and then realized the error of not establishing Venue. The court wrote in his own hand right over his signature that "The traffic stop was affected in Riverside County" . . . (See Exhibit "A").

The only references to any location came on cross-examination when the officer was asked:

"Q. Where exactly did I come to a stop?
A. 200 feet west of I-15.
Q. Did you come on the freeway at Main Street in Corona?
A. I don't recall."

It would appear that these questions were not in the category of establishing Venue. There are many places in this state where you could stop "200 feet west of I-15." The officer did not "recall" about the freeway and Corona, so this certainly would not establish Venue. Therefore it would appear that the People through the District Attorney never established Venue for the jurisdiction of the trial court. The court tried as best it could to right the situation by noting this error in the Settled Statements on Appeal.

SPEEDOMETERS AND HOW THEY FUNCTION

The following is quoted for the purpose of argument from Am.Jur. Proof of Facts Annotated, Vol. 10, pp. 727, 728, 729:

> **"Principle of speedometer operation. A speedometer registers mileage by means of a flexible cable geared to the vehicle's transmission, and connected to indicator wheels on the instrument panel. The cable rotates with the transmission. The wheels on the instrument panel are adjusted so that for every 1,000 revolutions of the cable they indicate another mile.**
>
> **"Operation of speedometer needle.** The needle indicating the vehicle's rate of speed moves back and forth, or up and down over a scale on which movement is in response to magnetic currents that become stronger as the cable turns faster. When the cable stops turning, a finely adjusted wire spring returns the needle to zero position. Although a speedometer may have a high degree of accuracy when checked in the laboratory before installation in the particular vehicle, it is likely to develop considerable inaccuracies within a short time after installation, owing to changes in temperature, magnetic currents, cable wear and ratio, tire radius, and so on."

The above is quoted for information purposes of the court in showing the basic operations of the speedometer and what the differences or what different factors influence the reading of a speedometer.

"**Speedometer error. Sources.** Most speedometers installed on private passenger vehicles have varying degrees of error in their miles per hour indications. These errors are of varied origin. Among their causes are faulty adjustments in the magnetic mechanism, incorrect speedometer drive gear ratio, errors in calibration so that speedometer readings indicating rising speeds are different from those indicating falling speeds, inaccuracies caused by speedometer dial design, the angle from which the reading is taken, etc. Since most speedometer mechanisms cannot maintain the same degree of accuracy at both high and low

tereds, manufacturers generally use speedometers designed to register higher than actual rates at higher speeds, so that the degree of error increases as the speed increases. Speedometer errors are also caused by changes in tire rolling radius. Because of this, even 'test certificates' certifying police or highway patrol car speedometers are accurate may be in error. Errors caused by changes in tire rolling radius, such as tire size (for example the winter months), tire wear, differences in inflation pressures, and so on may result in speedometer errors of as much as 10%. [For errors in reading speedometer caused by angle of view, etc., see SPEED.] [For chart showing effect of tire size on speedometer accuracy, and chart showing speedometer error at various miles per hour in tests made with various makes of automobiles, see Appendix Figs. 28, 29]."

The defendant directs the court's attention to Figure 28 in Am.Jur. Proof of Facts Annotated, Vol. 10 which gives a percent of error on tire size from about 1½% all the way up to over 5%, depending upon the size of the tires. Also the revolutions per minute on Chart 2 of Figure 29 shows the great difference there is in the effect of tires on the speedometer.

This would not only hold true for the police unit that was used in this case, but would also hold true for the defendant's car. The basic argument of the defendant is that he was not travelling more than 55 miles an hour. It would appear to the defendant that it is quite possible that the highway patrol unit was in error with his speedometer and as quoted in Am.Jur. that speedometers only run **fast**, they do not run slow. (Emphasis added.) Therefore any calibration error would be on the plus side rather than on the minus side, the defendant's car going less than the speed that the speedometers were actually reading. In Am.Jur. Proof of Facts, Vol. 11, page 13, the following is quoted:

> "1. **Opinion testimony as to speed. Speed estimates.** Anyone who has observed a moving vehicle and professes to have an opinion as the the rate of speed at which the vehicle is moving, based on that observation, may ordinarily give competent evidence of such speed, based on his observation.

"**Expert and non-expert testimony as to speed.** Opinions of both expert and non-expert witnesses are often material as to rate of speed. The non-expert opinion is usually given by one who has observed that the vehicle as it moved, or heard it, or heard the impact. The expert opinion is usually based on skidmarks or other physical data. In any event, the witness, either expert or non-expert must have some factual data on which to base his opinion. Opinion testimony as to speed will not be allowed from a witness when it appears that the facts from which he bases his estimate are so insubstantial that they demonstrate his opinion will be merely a guess. [For expert testimony as to rate of speed based on skidmarks, see SKIDMARKS AND STOPPING DISTANCES.]

"2. **Driver's opinion or estimates as to speed of vehicle.** The driver of a motor vehicle is usually competent to testify as to his opinion or estimate of the rate of speed at which he was moving just before the accident in question. The facts on which he bases his estimate and his motivation to testify favorably to himself are usually held to affect the weight of such testimony, rather than its competency."

It would appear from the above-quoted material that what the officer actually was testifying to in this particular case before the court when asked at what speed the defendant was travelling was merely stating a "guess" as to his opinion as he only had an uncalibrated speedometer to back up any of those facts.

It should be noted that the driver's opinion also holds some amount of validity as far as how fast he was going. He testified that he was not exceeding 55 miles an hour and although the weight of this testimony might differ, certainly it is competent testimony as stated in the above.

Am Jur. Vol. 11, page 14 reads in part as follows:

> **"Factors determining probative value of testimony.**
>
> The probative value of testimony of speedometer readings to prove rate of speed depends on several factors. Among them are:
>
> 1) The accuracy of the speedometer (at higher speeds, factory-installed speedometers on private automobiles characteristically register a rate of speed from 5 to 15 miles an hour faster than the vehicle is actually travelling.)
>
> 2) The accuracy of the reading.
>
> 3) The accuracy of the recollection of the reading.
>
> These factors, while not essential as a foundation to admit the evidence, may have to be proved if cross-examination or other evidence casts doubt on the accuracy of the speedometer or the reading. The accuracy of the reading may also be affected by the angle from which it is viewed . . ."

From the above, it would appear that the basic difference can be anywhere from 5 to 15 miles an hour faster than the vehicle is actually travelling. In this particular case, if we take the average in there of from 5 to 15 miles an hour faster, the average would be approximately 10 miles an hour faster

than what the defendant was actually going. Therefore we raise the question that probably the speedometer was in fact in error in both vehicles and that there was no solid proof that the California Highway Patrol Vehicle's speedometer was accurate. Further citing from Am.Jur. Vol. 11, page 14:

> "4. **Accuracy of speedometer reading.** Although a speedometer reading is acceptable evidence of speed, the speedometer may be inaccurate as much as 5 to 15 miles an hour within the range of its normal operation and good state of repair, especially at higher speeds. It may therefore be desirable to present some evidence of the speedometer's accuracy. [For principles of speedometer operation and sources of speedometer error, see SKIDMARKS AND STOPPING DISTANCES.]"

Again it would appear from the above reading that inaccuracies would only be eliminated possibly by a calibrated speedometer reading immediately before the pace and also a calibrated speedometer of the same vehicle after the pace. Therefore not only was there no calibration of the speedometer submitted before there was also none submitted after, and therefore this would raise a reasonable doubt as to the accuracy and the calibration of the Highway Patrol Unit's speedometer.

In regard to the above, there are also several other factors that must be taken into consideration when reading the above material.

1. **Tires.** The radius of the tire according to size can change the reading of the speedometer after it has been calibrated. This can be done either by the rotation of the tires of the calibrated unit, or if a flat occurred and the spare was taken from the trunk to be placed on the unit. Also the air pressure of that tire plays an important part in the calibration of the speedometer in that the air pressure at the time the speedometer is calibrated would also have to be the same at the time that the calibrated unit was pacing a car. If the air pressure is greater or less than what it was when the unit was calibrated, this would effect the circumference of the tire and therefore affect the reading of the speedometer. Also another factor included in this would be whether the tire pressure was equalized under the hot and cold aspect of tire pressure as when the tires are cold there will be a different reading of air pressure than when the tires have been used for a while and they are worn. All of these factors would come into play on both the pace vehicle, or the California Highway Patrol unit, and the defendant's car on when the speedometers were calibrated and all of these other factors coming in on it as to how accurate either the defendant's speedometer was or for that matter the California Highway Patrol Unit.

However, the burden is on the People to prove the calibration of the speedometer of the Highway Patrol Unit. The burden should not be placed on the defendant to prove the calibration of his speedometer. It is incumbent on the People to prove beyond a reasonable doubt, and not on the defendant to offer any proof on the calibration.

NECESSARY ELEMENTS TO BE PROVEN IN A SPEED VIOLATION USING RADAR

The defendant would like to call the court's attention to the various radar cases involving speed violations of 22348 and 22350. In **People vs. Halopoff**, 63 C.A.3d Supp. 1, the defendant was convicted of violating the basic speed law, Section 22350 by driving 55 miles per hour in a 40 mile an hour zone.

In this case, the court reversed the conviction in that an engineering and traffic survey was not submitted to justify the speed limit in order to remove the case from the vehicle sections 40801 and 40805 and the sanctions of that in a speed trap situation. This was the first one of several radar cases. The next one that came along was **People vs. Steritt**, 65 C.A.3d Supp. 1. Again in this case the testimony was that the officer stated there was a traffic and engineering survey, but they never presented the evidence in court. There again, the court reversed this conviction saying that it had to be physically brought in to court. Another case involved was **People vs. Flaxman**, 74 C.A.3d Supp. 16 in which he challenged the traffic and engineering survey under the hearsay evidence rule.

The three cases cited above, supra, would indicate that in the type of speeding cases using radar that the court wants specific evidence presented to remove any evidence of a speed trap. Also in reading these cases, it will be noted that the evidence presented also requires that the police officer testify as to the calibration of the radar unit both before and after the reading on the violation. Also the officer has to

testify as to when the unit is calibrated outside of his own calibration, and this is submitted into evidence. Cases have now developed where the FCC license must be presented also indicating that the unit is legally licensed to operate by the Federal Communications Commission. This would appear that with the highly sophisticated electronic gear known as radar, that even this type of sophistication is not enough to get away from proving the elements of calibration of these units. The hand radar units, or what is known as the radar gun which is hand held, is much more susceptible to damage and miscalibration than the unit that is mounted on a patrol unit. Therefore, the proof of the calibration must be greater for the hand-held units than it is for the units on the patrol car. However, if any of these elements are missing, the traffic and engineering survey, the FCC license, the calibration both before and after, and the testimony on how to calibrate units, the charges must be dismissed in that the People have not proven beyond a reasonable doubt that the unit was actually operating properly. This would correlate very well with the case at point, and the defendant draws the court's attention to the fact that in the radar cases, there are so many stringent requirements of the proof of the calibration and yet in the case at hand there was no evidence at all of any calibration of any type of a speedometer of the police unit and therefore there was no proof beyond a reasonable doubt that the speedometer of the police unit was accurately calibrated and that the defendant was in violation of the 55 mile-per-hour speed limit.

In **People vs. Steritt**, C.A.3d Supp. 1, Footnote 4, it states:

"Respondent and the Los Angeles City Attorney both state that the Halopoff decision needs clarifying. They point out that at one point we described the prosecution's duty as being 'to demonstrate' the existence of the engineering and traffic survey and in another place 'to product' (sic) the survey. Respondent also wonders if 'produce' really means 'produce.' The Los Angeles City Attorney says it would be burdensome to produce the survey whether or not the defendant is interested in it.

A reading of Halopoff should make clear that we meant that the survey had to be physically produced in the courtroom and that it was the People's duty to establish that the survey justified the posted speed limit. Our language was explicit. The People must 'demonstrate the existence of the engineering and traffic survey required by section 40802, subdivision (b).' (See Veh. Code §627.) Of course, if a defendant is satisfied that such a survey exists and stipulates that the People need not produce it, that would be another matter."

In correlation to stipulating in this case, if a defendant poses no objection to the testimony of the police officer and the calibrated speedometer, then it would appear he waives his right to raise this on appeal and accepts the calibration as accurate. In the case at hand, the defendant did pose this objection and therefore the speedometer calibration was never entered into evidence.

HEARSAY EVIDENCE ADMITTED AND USED FOR CONVICTION

The officer while answering direct examination questions, was asked about the calibration of his unit's speedometer and he answered "In October of 1982." An objection was made by the defendant and when the defendant inquired as to what record the officer was testifying from the officer answered "my notes." The defendant then made his objection as Hearsay Evidence. The court overruled his objection. The District Attorney asked the same question again and the Officer answered the same. Again the defendant objected and was overruled by the court. Defendant then moved for a Continuing Objection to this line of questioning and was again overruled. Defendant then offered Exception. Later on cross-examination the officer was asked for his Certificate of Calibration of the CHP Unit's Speedometer, and the officer ansered, "I don't have one." The court allowed this hearsay evidence to be admitted. It was not admitted under any exception to the Hearsay Evidence Rule. The court also used this as a basis for the conviction.

Officer Barrera did not take this particular CHP unit to the Testing Center and remain there while it was calibrated. Someone else did. Therefore the officer testified to something that someone else did without even knowing who did it or where it was done. The person who did the calibrating nor the officer or mechanic who watched were ever called to testify in this case. These persons also were not a party to this case. Any action of other persons with regard to this speedometer as testified to by Officer Barrera would be purely hearsay evidence.

TIME, SPEED AND DISTANCE

The officer testified as to the time, speed and distance of the "pace" and the stop. His testimony seems to be as confusing as the face of the citation he filled out. On direct examination, the officer stated that he "paced" the defendant from first observation of the defendant to where the defendant stopped as being a total of a **"mile and a half."** On cross-examination, the officer testified that he "paced" the defendant from start to finish for about **2½ to 3 minutes**. If, as testified by the officer the defendant was "paced" at 75 m.p.h. and "pulling away" then we can assume the defendant was travelling at some speed greater than 75 m.p.h. At 80 m.p.h. a vehicle is travelling at 120 feet per second or 1.36 miles per minute. At 75 m.p.h. a vehicle would be travelling 113 feet per second. Therefore there being only 7 feet per second difference we will use, for purposes of demonstration, the former 80 m.p.h. for the diagram. If the officer "paced" the defendant as he stated on direct examination "one and one-half miles," it would have taken a slight bit fmore than **ONE MINUTE**. If, however, as the officer stated on cross-examination "2½ to 3 minutes," then the "pace" would have covered from **3.4 MILES TO 4.1 MILES** at 80 m.p.h. Mathematically it is impossible to "pace" the defendant by the different measurements that the officer testified to and come even close to the same answer. From the officer's testimony it appears that he was from 1.9 to 2.6 miles in error or from 126% to 173% in error as he testified. (See Exhibit "B".)

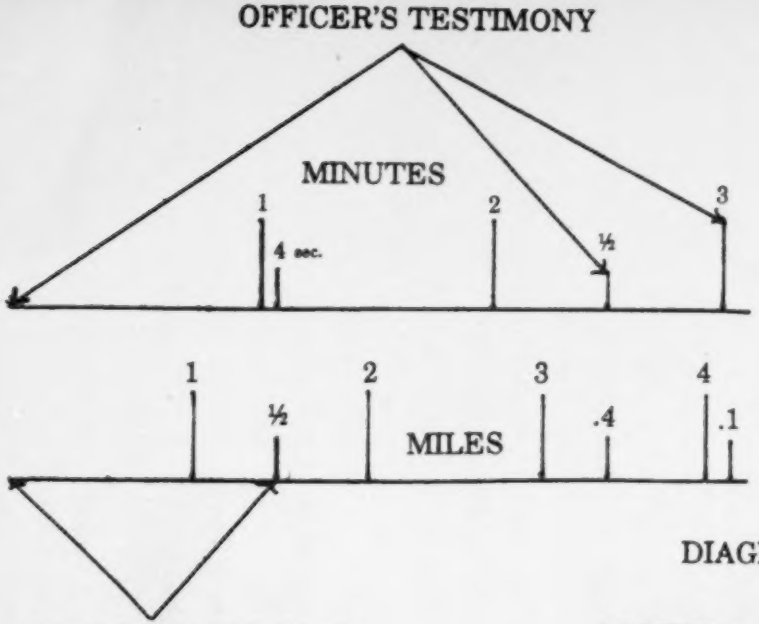


DIAGRAM IS DRAWN USING 80 M.P.H.

75 MPH equals 113 FEET PER SECOND
equals 1.28 MILES PER MINUTE
80 MPH equals 120 FEET PER SECOND
equals 1.36 MILES PER MINUTE

EXHIBIT B

DISTANCE AND DEPTH PERCEPTION

Assuming that the inter-lineation and the change of time from 5 p.m. to 5 a.m. by the court is correct, then the fact must also be accepted that the officer was making his "pace" and observations in the dark of night. Sunrise that day was approximately two hours later at 6:57 a.m. Pacific Standard Time.

The officer testified that he was 600 feet behind when he first caught sight of the defendant and "paced" him at the same distance of 600 feet. To make this statement a little more understandable, this distance would translate into "over two city blocks" or the actual length of two football fields placed end to end. Two hundred yards would be another way of saying it.

At night an average person's depth perception decreases by about 25% over his day vision. Also at night, a person's Minimum Visual Angle is affected by his acuity. The person's acuity and MVA is again greatly affected by the angle of the degree of the line of sight and the distance from the eye of the observer to the object, plus the actual lateral distance between any objects being observed. When applied in this case, the above facts would mean that the officer was observing **a moving object, from a moving object,** with a **25% reduction in depth perception,** and an **acuity** that was constantly changing thereby rendering his **Minimum Visual Angle** almost useless. Add to this the fact that he was two city blocks behind the defendant and moving at a speed of 113 feet per **second** or 75 m.p.h. He could only be using the taillights of the defendant's vehicle

to make this observation. The distance between two taillights would haave to be considered. The worse possible objects to observe would be bright lights against a black background. To accomplish this feat as the officer testified it would take par excellence in both eyes and **Super Vision** to ascertain the defendant's car was "pulling away at 75 m.p.h."

NO DIRECTION OF TRAVEL AND NO HIGHWAY IDENTIFICATION

It should be noted on appeal that there was no direction of travel established in the trial court. Again the District Attorney did not seem to care about which direction the Defendant was travelling during the "pace." Also, he showed no interest in the name or number of the highway where the infraction supposedly took place. On cross-examination the officer stated the defendant stopped "200 feet from I-15." To another question about the freeway and Corona the officer answered, "I don't recall." Neither of these questions would establish the direction of the "pace" nor the name or number of the highway.

ELEMENTS NECESSARY TO BE PROVEN FOR A VIOLATION OF VEHICLE CODE SECTION 22348(a)

From a reading of Vehicle Code Section 22348(a) it appears that there are four necessary elements that must be proven in order to find a person guilty of this violation.

First, it must be proven that a vehicle was used by a person.

Secondly, it must be proven that a person was operating the vehicle.

Thirdly, it must be on a highway.

Fourth, the vehicle must have been driven at a speed of more than 55 miles per hour.

The defendant here recognizes the fact that the vehicle was identified as his vehicle. The defendant was also identified by Officer Barrera, the officer who cited the defendant, as the one driving. The defendant also acknowledges the fact that the motor vehicle was being driven on a highway.

The fourth element, the speed greater than 55 miles an hour, was not proven.

The officer testified as to the facts and that he observed the vehicle travelling on the highway. He also identified the defendant as the person operating the motor vehicle. The officer then testified that the speed was in excess of 75 miles an hour. The District Attorney asked, "When was the Highway Patrol Unit's speedometer calibrated?" With that the defendant objected, and made an inquiry as to what type of records the officer was testifying from and he replied his notes. With this the defendant said that his objection was then hearsay. The court overruled his objection to **hearsay evidence.** (Emphasis added.)

Therefore the calibration and the accuracy of the California Highway Patrol Unit was never proven, except by hearsay evidence, so therefore the element of "greater than 55 miles an hour" was never proven beyond a reasonable doubt.

Judge Robert T. Timlin, in a Judgment of Not Guilty and Memorandum of Opinion Thereon, dated January 30, 1978, while sitting in the Municipal Court, Corona Judicial District, gave a well reasoned and strict interpretation of a traffic violation evidenced by Radar.

In People vs. Hettinga, C 59164, the court first overruled the defendant's objection to the introduction of radar evidence without first presenting the traffic and engineering survey.

The court then reconsidered and said, "based on the plaintiff's failure to produce the traffic and engineering survey . . . it is withour jurisdiction to render a judgment of conviction against defendant . . . **Hettinga, supra.**

The court continued, "The testimony of a traffic officer, who did not conduct the traffic and engineering survey, that such a survey exists is not sufficient to satisfy the People's evidentiary burden as stated above. See **Halopoff-Seerritt-Flaxman.** If such evidence is not offered by the People or if the defendant is not satisfied that such a survey exists and does not stipualte that the People need not produce it, any testimony of an officer as to speed based on a radar fix on a street with a **prima facie** speed limit is incompetent and inadmissable. **(People vs. Hettinga, Corona Municiple Court, C 59164)**

This case, coming from the same court that convicted the defendant in the present case, seems to indicate the strictness of the construction of a Code.

"Excess of 55 miles per hour" in the Vehicle Code §22348(a), if construed as in the **Hettinga** case, would mean that the officer must prove the calibration of the speedometer with some official documents and not by hearsay evidence.

No exception to the hearsay rule was requested nor given. The Officer's testimony was pure hearsay. A criminal conviction should not rest on hearsay evidence, no matter who the witness was.

SUPERIOR COURT RIVERSIDE COUNTY
VS.
SUPERIOR COURT SAN BERNARDINO COUNTY

Defendant respectfully submits that the following questions of law are involved:

1. The Riverside County Court will convict on hearsay evidence and no certificate of speedometer calibration. When this conviction is appealed, without any opposition, the Appellate Department of the Superior Court will uphold this conviction.

2. The San Bernardino Court will convict on the same set of circumstances and evidence, **but** will on Appeal reverse and dismiss these convictions.

The following four pages are a partial record of two different cases with two different defendants.

The first case came out of Municipal Court in Ontario, and was a conviction for a violation of Vehicle Code §22348(a).

The appeal was heard by the Appellate Department of the Superior Court for the County of San Bernardino. A letter from the San Bernardino District Attorney by one of his deputies, Kenneth J. Melikian, who tried this case, would appear to sum up all the evidence in these cases. He offers no opposition to the appeal. In the case at hand, Deputy D.A. Cregor G. Datig also offers no opposition to the appeal. It would appear in the present case that the Respondent's Brief by DDA Datig is analogous to the letter from DDA Melikian to the Appellate Department of Superior Court for San Bernardino County.

The Appellate Department of Superior Court for Riverside County AFFIRMED this conviction in the present case, while a few years ago the Appellate Department of the Superior Court for San Bernardino County, REVERSED and DISMISSED the conviction, for the same violations and on the same set of circumstances.

The second case is a Municipal Court Conviction in the Chino Division for the same violation. When this was appealed, the trial court by Judge Phillip E. Schaffer, on its own Motion granted a new trial and dismissed the charges.

There appears to be some great difference of opinions in these two counties as to the evidence needed to uphold a conviction for a violation of Vehicle Code §22348

RESPONDENT'S BRIEF

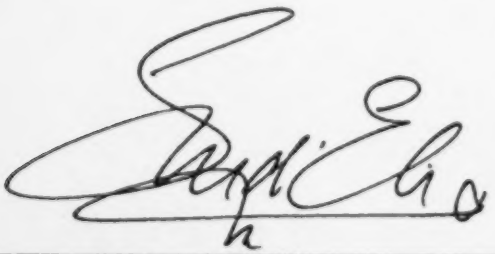
The People, in their Respondent's Brief, have seen fit to join with the Appellant and stipulate to all of the facts, arguments, and for that matter the conclusion of the Appellant's Opening Brief.

No resistance was offered to any of the arguments nor to the Conclusion that requested a reversal and dismissal. (See Appendix "C".)

CONCLUSION

Under his constitutional guarantee, the defendant was denied "due process and equal protection," as he could not cross-exam the evidence presented against him, namely the certificate of calibration.

Respectfully submitted,

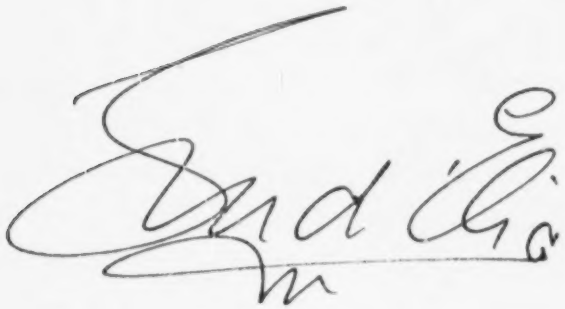


Serge M. d'Elia
Defendant in Pro Per

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Petitioner knows of no cases that are related to this appeal which are now pending before this court.

DATED: January 6, 1984.



Serge M. d'Elia

APPENDIX

APPENDIX A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
(APPELLATE DEPARTMENT)

FILED
Riverside County
OCT 21, 1983
WILLIAM E. CONNERLY, Clerk
A. M. Galvan
Deputy

PEOPLE,
Plaintiff & Respondent
vs.
SERGE M. d'ELIA
Defendant & Appellant

Case No. A-1016
DECISION ON APPEAL
(CMC S607901)

The above entitled cause having been heretofore fully argued and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the Municipal Court of the Corona Judicial District, County of Riverside, in the above entitled cause, is hereby AFFIRMED.

Dated: OCT 21, 1983

Judges of the Appellate Department
DECISION ON APPEAL

DATE & DEPT.
11-08-83

NUMBER: A-1016 **APPENDIX B** APP

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE: PEOPLE (Respondent) vs. SERGE M. d'ELIA (Appellant)

COUNSEL:
District Attorney — Pro Per

REPORTER:
None

PROCEEDING:
Ex-Parte Hearing re: Petition for Rehearing and/or Certification.

The above Petition is denied.

JOHN H. BARNARD, Judge
Galvan, Clerk

/ R/A CAL. / 1 ATTY(S). / Pro Per
MINUTES OF SUPERIOR COURT

APPENDIX C

GROVER C. TRASK II
District Attorney
County of Riverside
4080 Lemon Street, 2nd Floor
Riverside, California 92501
Telephone: (714) 787-2525

Attorney for Plaintiff
and Respondent

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE
(SITTING AS AN APPELLATE DEPARTMENT)

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
SERGE M. d'ELIA,
Defendant and Appellant.

NO. A-1016
(Corona Municipal
Court Case No. S607901)

RESPONDENT'S BRIEF
(Hg: 10-7-83 2:00 p. m.)

TOPICAL INDEX

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Attorney for Plaintiff
and Respondent

IN THE SUPERIOR COURT OF THE
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(SITTING AS AN APPELLATE DEPARTMENT)

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
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(Corona Municipal
Court Case No. S607901)

RESPONDENT'S BRIEF

(Hg: 10-7-83 2:00 p. m.)

I
STATEMENT OF FACTS

The statement of facts as set forth in Appellant's Opening Brief is sufficient for purposes of this appeal.

II
ISSUES ON APPEAL

The issues as set forth in Appellant's Opening Brief are accepted as the determative issues on appeal.

III
ARGUMENT

The People submit on the arguments presented in the Appellant's Opening Brief.

IV

CONCLUSION

The People submit the matter without further argument.

Dated: September 12, 1983

Respectfully submitted,
GROVER C. TRASK II
District Attorney
By:
CREGOR G. DATIG
Deputy District Attorney

CGD:co
3,1 D 105

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On January 7, 1984, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing three (3) true copies in each of three (3) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Clerk of the Municipal Court
Corona Judicial District
505 S. Buena Vista Ave.
Corona, California 91720

Clerk of the Superior Court
Appellate Division
County of Riverside
4050 Main Street
Riverside, California 92502

District Attorney
County of Riverside
Corona Judicial District
505 S. Buena Vista Ave., Rm. 201
Corona, California 91720

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on January 7, 1984, at Riverside, California.

JACK GALLAGHER